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Individuals with Disabilities Education Act (IDEA): Services in Private Schools under P.L. 108-446

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Summary

The Individuals with Disabilities Education Improvement Act of 2004, P.L. 108-446 makes several changes to the previous law regarding children with disabilities in private schools. Generally, children with disabilities enrolled by their parents in private schools are to be provided special education and related services to the extent consistent with the number and location of such children in the school district served by a LEA pursuant to several requirements. These requirements include new provisions relating to direct services to parentally placed private school children with disabilities, the calculation of the proportionate amount of funds, and a requirement for record keeping. The new law also adds compliance procedures. For a general discussion of the changes made by P.L. 108-446 see CRS Report RL32716, *Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446*. This report will be updated as necessary.

Background

The Individuals with Disabilities Education Act (IDEA) is a grants and civil rights statute which provides federal funding to the states to help provide education for children with disabilities. If a state receives funds under IDEA, it must make available a free, appropriate public education (FAPE) for all children with disabilities in the state.[1] Under the law prior to the enactment of P.L. 105-17 in 1997, states were required to set forth policies and procedures to ensure that provision was made for the participation of children with disabilities who are enrolled in private schools by their parents consistent with the number and location of these children. These requirements were further detailed in regulations which required that local education agencies (LEAs) provide private school students an opportunity for equitable participation in program benefits and that these

[1] 20 U.S.C. §1412(a)(1)(A).

benefits must be "comparable in quality, scope, and opportunity for participation to the program benefits" provided to students in the public schools.[2] The vagueness of the statute and the "equitable participation" standard led to differences among the states and localities and to differences among the courts. Prior to P.L. 105-17, the courts of appeals that had considered these issues had sharply divergent views. Some courts gave local authorities broad discretion to decide whether to provide services for children with disabilities in private schools which generally resulted in fewer services to such children[3] while others attempted to equalize the costs for public and private school children.[4] The Supreme Court had granted *certiorari* in several of these cases but when Congress rewrote the law in 1997, the Court vacated and remanded these cases for further consideration.[5]

The IDEA Amendments of 1997 rejected the "equitable participation"standard and provided that to the extent consistent with the number and location of children with disabilities in the state who were enrolled in private schools by their parents, provision was made for the participation of these children in provisions assisted by Part B by providing them with special education and related services.[6] The amounts expended for these services by an LEA were to be equal to a proportionate amount of federal funds made available to the local educational agency under Part B of IDEA. These services could be provided to children with disabilities on the premises of private schools, including parochial, elementary and secondary schools.[7] There was also a requirement that the statutory provisions relating to "child find," identifying children with disabilities, are applicable to children enrolled in private schools, including parochial schools.[8]

More changes to these provisions were made by the 2004 reauthorization, P.L. 108-446. The Senate report observed that "the intent of these changes is to clarify the responsibilities of LEAs to ensure that services to these children are provided in a fair and equitable manner."[9] In addition, the Senate report stated that "many of the changes reflect current policy enumerated either in existing IDEA regulations or the No Child Left

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[2] Former 34 C.F.R. §§ 76.651-76.662.

[3] *See e.g., Goodall v. Stafford County Public School Board*, 930 F.2d 363 (4th Cir. 1991), *cert. denied*, 502 U.S. 864 (1991); *K.R. v. Anderson*, 81 F.3d 673 (7th Cir. 1996), vac. 138 L.Ed.2d 1007(1997), 125 F.3d 1017 (7th Cir. 1997), *cert. denied*, 140 L.Ed. 510 (1998).

[4] *See e.g., Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996), vac. 521 U.S. 1114 (1997), on remand, 150 F.3d 219 (2d Cir. 1998).

[5] It should be noted that in addition to the requirements of IDEA, schools must also comply with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*, where applicable. These statutes essentially prohibit discrimination against an otherwise qualified individual with a disability.

[6] P.L. 105-17, §612(a)(10)(A). Part B of IDEA contains the state formula grant program, the requirement for a free appropriate public education for all children with disabilities and due process protections for such children.

[7] *Id.*

[8] P.L. 105-17. §612(a)(10)(A)(ii).

[9] S. Rep. No. 185, 108th Cong. 1st Sess. 15 (2003).

Behind Act."[10] The House report noted that "the bill makes a number of changes to clarify the responsibilities of local educational agencies to children with disabilities who are placed by their parents in private schools. The Committee feels that these are important changes that will resolve a number of issues that have been the subject of an increasing amount of contention in the last few years."[11]

Private School Placement under P.L. 108-446

Types of Private School Placements. A child with a disability may be placed in a private school by the LEA or State Educational Agency (SEA) as a means of fulfilling the FAPE requirement for the child. In this situation the cost is paid for by the LEA. A child with a disability may also be unilaterally placed in a private school by his or her parents. In this situation, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents. Exactly what these services are or should be has been a contentious subject for many years as was noted previously. The 2004 reauthorization includes several changes to the provisions relating to children who are placed in private school by their parents. The provisions relating to children placed in private schools by public agencies were not changed.

Children with Disabilities Placed in Private Schools by their Parents. Generally, children with disabilities enrolled by their parents in private schools are to be provided special education and related services to the extent consistent with the number and location of such children in the school district served by a LEA pursuant to several requirements (§612(a)(10)(A)(i)). This provision was changed from previous law by the addition of the requirement that the children be located in the school district served by the LEA. The Senate report described this change as protecting "LEAs from having to work with private schools located in multiple jurisdictions when students attend private schools across district lines."[12]

There are five requirements regarding children parentally placed in private schools. The first is that the funds expended by the LEA, including direct services to parentally placed private school children, shall be equal to a proportionate amount of federal funds made available under part B of IDEA. The 2004 reauthorization added the phrase regarding direct services. The Senate report stated that "it is the committee's intent that school districts place a greater emphasis on services provided directly to such children — like specifically designed instructional activities and related services — rather than devoting funds solely to indirect services such as professional development for private school personnel."[13]

Second, a new provision relating to the calculation of the proportionate amount is added. In calculating this amount, the LEA, after timely and meaningful consultation with

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[10] *Id.*

[11] H. Rep. No.77, 108th Cong., 1st Sess. 94 (2003).

[12] S. Rep. No. 185, 108th Cong., 1st Sess. 15-16 (2003).

[13] *Id.*

representatives of private schools, shall conduct a thorough and complete child find process to determine the number of children with disabilities who are parentally placed in private schools.

Third, the new law keeps the previous requirement that the services may be provided to children on the premises of private, including religious schools, to the extent consistent with law. The 2004 reauthorization added the term "religious" while deleting the term "parochial."

Fourth, a specific provision regarding supplementing funds, not supplanting them, is added. State and local funds may supplement but not supplant the proportionate amount of federal funds required to be expended.

Fifth, each LEA must maintain records and provide to the SEA the number of children evaluated, the number of children determined to have disabilities, and the number of children served under the private school provisions. The House report stated that "such requirement ensures that these funds are serving their intended purpose."[14] The general requirement regarding child find is essentially the same as previous law. The requirement for finding children with disabilities is the same as that delineated in §612(a)(3) for children who are not parentally placed in private schools, including religious schools. As was done in the previous section, the former use of the term "parochial" is replaced by the term "religious" in the new law. New provisions are added concerning equitable participation, activities, cost and the completion period. Child find is to be designed to ensure the equitable participation of parentally placed private school children with disabilities and their accurate count. The cost of child find activities may not be considered in meeting the LEA's proportional spending obligation. Finally, the child find for parentally placed private school children with disabilities is to be completed in a time period comparable to that for students attending public schools. (§612(a)(10)(A)(ii))

Consultation Between the Local Educational Agency and Private School Officials. P.L. 108-446 adds requirements concerning LEA consultation with private school officials and representatives of the parents of parentally placed private school children with disabilities. This consultation is to include

- the child find process and how parentally placed private school children with disabilities can participate equitably;
- the determination of the proportionate amount of federal funds available to serve parentally placed private school children with disabilities, including how that amount was calculated;
- the consultation process among the LEA, private school officials and representatives of parents of parentally placed private school children with disabilities, including how the process will operate;
- how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities,

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[14] H.Rep. No. 77, 108th Cong. 1st Sess. 94 (2003). See also S. Rep. No. 185, 108th Cong., 1st Sess. 15-16 (2003) which states that this requirement was "to help to ensure that these funds are serving their intended purpose."

including a discussion of the types of services, including direct services and alternate service delivery mechanisms, how the services will be apportioned if there are insufficient funds to serve all children and how and when these decisions will be made; and

- how the LEA shall provide a written explanation to private school officials of the reasons why the LEA chose not to provide services if the LEA and private school officials disagree. (§612(a)(10)(A)(iii))

The Senate report described the consultation procedure as similar to that in the No Child Left Behind Act and "therefore, the committee does not believe including these provisions places an undue burden on LEAs."[15]

The new law requires a written affirmation of the consultation signed by the representatives of the participating private schools. If the private school representatives do not sign within a reasonable period of time, the LEA shall forward the documentation to the SEA. (§612(a)(10)(A)(iv))

Compliance procedures also are added by P.L. 108-446. Generally, a private school official has the right to submit a complaint to the SEA alleging that the LEA did not engage in meaningful and timely consultation or did not give due consideration to the views of the private school official. If a private school official submits a complaint, he or she must provide the basis of the noncompliance to the SEA, and the LEA must forward the appropriate documentation. If the private school official is dissatisfied with the SEA's determination, he or she may submit a complaint to the Secretary of Education, and the SEA shall forward the appropriate documentation to the Secretary. (§612(a)(10)(A)(v))

Equitable Services. The 2004 reauthorization contains a specific subsection regarding the provision of equitable services. Services are to be provided by employees of a public agency or through contract by the public agency. In addition, the services provided are to be "secular, neutral, and nonideological." (§612(a)(10)(A)(vi)) The new law further states that the funds that are available to serve pupils attending private schools shall be controlled and administered by a public agency. (§612(a)(10)(A)(vii))

Reimbursement for Private School Placement. As noted above, when a child with a disability is unilaterally placed in a private school by his or her parents, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. As in previous law, this reimbursement may be reduced or denied if the child's parents did not give certain notice. (§612(a)(10)(C)(iii)) Both the 1997 and 2004 reauthorizations contain an exception to this limitation, but this exception is changed somewhat in the new law. Under the new law, the cost of reimbursement is not to be reduced or denied for the failure to provide notice if:

- the school prevented the parent from providing such notice;
- the parents had not received notice of the notice requirement; or
- compliance would likely result in physical harm to the child.

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[15] S. Rep. No. 185, 108th Cong., 1st Sess. 15 (2003).

Previous law had included a provision that reimbursement not be reduced or denied if a parent is illiterate and had included "serious emotional harm."

P.L. 108-446 also contains a new provision allowing, at the discretion of a court or hearing officer, the reimbursement not to be reduced or denied if:

- the parent is illiterate or cannot write in English; or
- compliance with the notice requirement would likely result in serious emotional harm to the child. (§612(a)(10)(C)(iv))